IN THE SUPREME COURT OF THE UNITED STAT

No. ~~289~~ 128.

LEONARD T. SMITH,

vs.

CLINTON COCKRILL.

ARGUMENT FOR DEFENDANT IN ERRO

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IN THE SUPREME COURT

OF THE UNITED STATES.

LEONARD T. SMITH, Plaintiff in Error,

vs.

CLINTON COCKRILL, Defendant in Error.

Argument for Defendant in Error.

This is a proceeding in error to reverse a judgment of the Circuit Court of the 9th Circuit of the United States for the District of Kansas, rendered on the verdict of a Jury at the May Term thereof, 1864.

The suit in which the Judgment was rendered was an action for the recovery of real property, (the same being in the nature, and to the effect of an action of Ejectment,) brought by Clinton Cockrill against Leonard T. Smith, for the recovery of Twelve (12) lots in Clark & Rees' addition to the City of Leavenworth, which lots are particularly described in said Judgment, which was rendered in Cockrill's favor for the recovery of said lots and costs of suit. The question I understand now to be involved in this case is whether or not, the Court erred on the trial in instructing the Jury that "The Deed of the United States Marshal offered herein is void, and conferred no title on the defendant."

It will be seen by reference to the exceptions taken in the the Court below, (see page 14 of the printed record herein) that on the 29th day of May, 1861, Edmund A. W. Hunter recovered judgment in the District Court of the United States for the District of Kansas, against Jeremiah Clark, Samuel F. Few

and Amos Rees for the sum of $1,277,16 and costs of suit, which judgment was rendered (see pages 19 and 20 of said record) on a Note, dated "Leavenworth, Nov. 8th, 1859," whereby said Clark, Rees & Few promised to pay said Hunter 1,040.00—and interest at 30 per cent.

And that on the 30th day of May, 1861, Nancy McA. Morris (see said page 14 of record) recovered in said District Court, judgment against said Clark, Rees & Few, and also one Robert C. Thompson for $1,278,25 and costs of suit, on a Note (see pages 20 and 21 of said record) dated "Leavenworth City, K. T. April 13th, 1860," whereby said Clark, Rees, Few, and Thompson promised to pay, six months after the date thereof to said Nancy McA. Morris $1,000,00 with interest at 20 per cent.

And that (see page 22 of said record) these Notes were made in Kansas at the time they bear date, and that the makers thereof were then residents of Kansas.

And that (see said page 14 of record) writs of execution were issued on said judgments, on one in June, 1861, on the other in July, 1861.

And that under pretence of authority claimed to have been conferred by said executions, the Marshal of the United States for said District of Kansas, levied on, as the property of said Clark, and on the 8th of August, 1861, (see page 15 of record) sold said lots to Leonard T. Smith, for the purpose of satisfying said Executions, without any appraisement thereof having been made (see said page 22 of record.)

And afterwards, on the 26th day of August, 1861, said Marshal, by his Deed, conveyed said lots to said Smith to complete his said execution sale thereof. This Deed does not recite any appraisement, or notice of appraisement of said lots, nor any confirmation by said District Court, of said Marshal's sale thereof, nor any order of said Court directing the Marshal to execute such Deed, there being no such appraisement, confirmation or order to make Deed.

The defendant objects to said sale of said lots so made by said Marshal, that the same is null and void, for want of any law applicable to him or to said judgments or executions empowering said United States Marshal to sell any land on execution, at the time when he made the sale.

He also objects to the commands contained in said executions, in relation to real estate, (see page 14 of record) that such commands were the mere unauthorized directions of the

Clerk of said District Court, and therefore void, because there was not any Act of Congress authorizing a command to sell lands to be inserted in such executions, at Common law it could not be done, nor had any State law in relation to sale of lands, process of execution, or satisfaction of judgments been adopted by said District Court at the time when said sale was made.

And also that for these reasons, said Marshal did not have power to levy said executions on, or to sell said lots, in any manner whatever, either in conformity with the requisitions of the laws of Kansas in reference to Sheriff sales, or otherwise at all.

To determine the question of the right or power of said Marshal to levy said executions on, or to sell said lots by virtue of the same, and the other objections made, it is necessary and proper, first to ascertain by what law, and by what law-making authority put in force, United States Marshals are to be governed, and when, and how far, and the circumstances under which, such law is to be the rule of action governing United States Marshals in their proceedings on executions issued out of the Federal Courts.

1. Congress has passed no law making judgments in the Courts of the United States liens on lands, or authorizing United States Marshals to levy executions on any property whatever, nor any law governing their proceedings thereon, otherwise than by adopting certain State laws of certain States, and by authorizing certain Courts of the United States to adopt certain other laws of such States.

Bank of the United States vs. Halstead, 10 Wheaton, 62.
Ward, et al. vs. Chamberlain et al., 2 Black 430.

2. Such laws of the several States in relation to proceedings on writs of execution as have been adopted by Acts of Congress, and such also as have been adopted by the several Federal Courts in conformity with, and under the power given to such Federal Courts, by Congress, are the rules by which United States Marshals are governed in their proceedings in executing writs of execution issued out of the Federal Courts.

1st United States Statutes at large, p. 93, sec. 2.
Ibid, 276, sec. 2.
4 Ibid, 281, sec. 3.

5 Ibid, 499.
Wayman vs. Southard, 10 Wheaton, 32 and 44
Bank of the United States vs. Halstead, ibid, 51, 64.
Ross vs. Duval, 13 Peters 60.
Beers vs. Haughton, 9 Peters 359, 360 and 362, 3.
United States vs. Knight, 14 Peters 314, 315, 316 and 317.
McCracken vs. Hayward, 2 Howard U. S., 614, 615.

3. And only such State laws as have been thus adopted either by congress, or by authority thereof, govern, or control, or extend to, or in any manner affect, impose duties, or confer powers, on such United States Marshals in their proceedings in executing such process.

Wayman vs. Southard, 10 Wheaton 32—48–9 and 50.
Bank of the United States vs. Halstead, ibid, 63–4–5.
Ross vs. Duval, 13 Peters, 59.
Keary vs. the Farmers & Merchants Bank of Memphis, 16 ibid, 94.
Bronson vs. Kinzie, 1 Howard U. S., 314, 315.
McCracken vs. Hayward, 2 ibid, 615.
Parsons vs. Bedford, 3 Peters, 444.
Ward et al. vs. Chamberlain et al. 2 Black, 440.

4. The State laws and proceedings on writs of execution and other final process used in the State Courts, which have been adopted by the Acts of Congress in relation to proceedings on executions, &c., of the Federal Courts, (which Acts of Congress were all passed long before Kansas was admitted or had a political existence, or had any laws or courts,) were only such State laws and proceedings as *were then, when* said process Acts of Congress of 1789, 1792, 1828 and 1842 were passed, in force and used in the *then* State Courts.

1st U. S Statutes at large, 93, sec. 2, 276 sec. 2, and 4 ibid 281, sec. 3.
Wayman vs. Southard, 10 Wheaton, 32, and 34, and 41, 48–9
Bank of the United States vs Halstead, ibid, 65.
Ross vs. Duval, 13 Peters, 60.
Beers vs. Haughton, 9 ibid, 362–3.
Bronson vs. Kinzie, 1 Howard U. S., 314–315.
McCracken vs Hayward, 2 ibid, 615.
Den ex. Dem Shrew & Winter vs. J. D. Jones, 2 McLean, 82
Ward et al. vs. Chamberlain et al., 2 Black 440 and 442.

5. And even when thus adopted and extended, such State laws and State Court proceedings only had force over, to control, and govern, and give power to the United States Marshals, in their proceedings in executing the executions, and other final process of the Federal Courts, because such State laws and proceedings were made the law, giving power to, and controling, and governing such United States Marshals, by the authority of the United States, and not because they were the law of the State or proceedings used in its State Courts.

Bank of the United States vs. Halstead, 10 Wheaton, 63–4
Wayman vs. Southard, ibid, 49–50.
Beers vs. Haughton, 9 Peters, 359.
Bronson vs. Kinzie, 1 Howard U. S., 314–315.
Lorman et al. vs. Clark, 2 McLean, 573 and 83.
Parsons vs. Bedford, 3 Peters, 444.

6. The phrase "The proceedings thereupon," in relation to executions, &c., used in the above cited process Acts of Congress, means the exercise, by the United States officers, of all the duties of the ministerial officers of the State, for the purpose of obtaining the fruits of judgments, and includes all the regulations and steps incident to process of execution, from its commencement to its termination, as prescribed by the State law, and includes all the laws which regulate the rights, duties and conduct of officers, in the service of such process, according to the exigency, upon the *person* or *property* of the execution debtor.

Wayman vs. Southard 10 Wheaton, 27–8–9 and 30.
Beers vs. Haughton, 9 Peters, 362.
United States vs. Knight, 14 ibid, 316 and 317.
Amis vs. Smith, 16 Peters 312 and 313.
Duncan vs. Darst, 1 Howard U. S., 306.

7. That the Federal Courts supposed it necessary by rule to adopt such State laws in relation to proceedings on executions and other final process used by the Court of the States, as had not been adopted by Congress, and to extend them to their own executions, &c., before the United States Marshals could proceed under or in conformity with such State laws.

See the cases cited above.

5 Ibid, 499.
Wayman vs. Southard, 10 Wheaton, 32 and 44
Bank of the United States vs. Halstead, ibid, 51, 64.
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1st U. S Statutes at large, 93, sec. 2, 276 sec. 2, and 4 ibid 281, sec. 3.
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Ward et al. vs. Chamberlain et al., 2 Black 440 and 442.

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Bank of the United States vs. Halstead, 10 Wheaton, 63–4
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See the cases cited above.

Also, Bank of the United States vs. Halstead, 10 Wheaton, 63.

And note anonymous, Peters, C. C. R., 1, found on page 280 of the 4th U. S Statutes at large.

Parsons vs. Bedford, 3 Peters, 445.

Ross vs. Duval, 13 ibid, 60.

Bayard vs. Lombard, 9 Howard U. S., 551.

Amis vs. Smith, 16 Peters 314.

8. The common law was not adopted or put in force in any of the States by Act of Congress or by authority of the United States.

Lorman et al. vs. Clark, 2 McLean, 572.

9. Judgments at common law were not liens on land, nor did the common law authorize the levying on, or sale of lands under execution.

Holman vs. Collins, 1 Carter, 25.

Lessee of Sellers vs. Corwin, 5 Ohio, 403.

4 Kent's Com., 428.

Gantley's Lessee vs. Ewing, 3 Howard U. S., 714.

2 McLean, 79 and 80.

Green vs. Marks, 25 Ills. 223.

10. And whether it did or not, would not matter so far as this case is concerned, for the reason that the common law is only in force in Kansas, so far as it is at all, because the State laws of Kansas, by Statute, put it so in force therein.

See compiled laws of Kansas, 678, sec. 1.

2 McLean, 572.

11. The United States Marshal could not derive any authority from the common law or Statutes of England put in force by said sec. 1, because of such adoption thereof by the State, any more than a State Statute passed expressly to control or impose duties or confer powers on such Marshal, could have that effect.

Wayman vs. Southard, 10 Wheaton, 49 and 50.

12. That Congress did not intend by the Act admitting Kansas into the Union, to extend the above cited provisions of the process Acts of Congress, to the District Court created by said Act of Admission, or to the judgments or process of said Court, so that the laws of Kansas in relation to judgments and executions, and proceedings thereon, would by virtue of the provisions of said Act of Admission, without adoption by the Court, extend to judgments of said District Court, or to its executions, and govern the proceedings of the United States Marshal thereon, is proved by the fact that the several Acts of Congress admitting different States, passed between 1789 and 1842, contain similar provisions in relation to United States laws, as those of said Act admitting Kansas. Notwithstanding which, said process Acts of 1828 and 1842 have been enacted. For such provisions in such Acts of Admission, see, Act admitting Tennessee,

1st U. S. Statutes at large, 491--2, amendment thereto, ibid, 617.
Ohio, 2 ibid, 201.
Louisiana, ibid, 703, sec. 2.
Indiana, 3 ibid, 390.
Illinois, ibid, 502.
Mississippi, ibid, 413.
Missouri, ibid, 653.
Arkansas, 5 ibid, 51, sec 3
Alabama, 3 ibid, 564.
Michigan, 5 ibid 61.
Vermont, 1st ibid, 197.

These Acts of Admission were all that were passed during that period of time, except the Acts admitting the States of Maine and Kentucky, each of which two last named States were integral parts of one of the original thirteen States up to the time of their admission; therefore, the laws of the United States continued in force over them as States, after their admission, in the same manner as before that time. Wherefore as to those two States, there was no occasion for such provision, and as none of the laws of Kansas were passed *until after* said process Acts of Congress were enacted, a holding that the laws of Kansas governing the proceedings on executions issued out of the State Courts, were adopted and extended to the ex-

ecutions of said U. S. District Court, by said Act admitting Kansas would be in conflict with the cases above cited, in which it is decided, that only such State laws, as were in force when said process Acts were enacted, were thereby adopted, and not State laws subsequently passed.

13. The law making power of the State of Kansas did not intend that the laws of the State in relation to judgment liens and to the levying on, and sale of lands on execution, should, of their own force, extend or relate to judgments in the Federal Courts, or to executions issued thereon, or to the proceedings of the United States Marshal under the same.

The Bank of the United States vs. Halstead, 10 Wheaton, 53
Lessee of Sellers vs. Corwin, 5 Ohio, 403.
Corwin vs. Benham, 2d Ohio State R., 38, 39.

14. A State law, whether it attempted to or not, could not of its own force, or without adoption, in any manner affect judgments of the Federal Courts or executions issued thereon or proceedings under the same, but only when and as adopted.

Wayman vs. Southard, 10 Wheaton, 49 and 50.
Bank of United States vs. Halstead, ibid, 63, 64 and 65.
Lessee of Sellers vs. Corwin, 5 Ohio, 405.
Corwin vs. Benham, 2 Ohio St. R. 38 and 39.
Parsons vs. Bedford, 3 Peters 444.
Ward et al. vs. Chamberlain et al. 2 Black, 440.

15. The law of Congress, the 34th section of the judiciary act, which makes the State laws rules of decision in the courts of the United States, in cases where they apply, does not apply to process and proceedings thereon, and State laws in relation to judgments, their liens, executions and proceedings thereon, were, not, by said section 34, adopted as a rule of decision, or property, as such to have force in the Federal Courts.

Wayman vs Southard, 10 Wheaton, 24, 5 and 6, and 49.
Bank of the United States vs. Halstead, ibid, 54.
Massingill vs. Downs, 7 Howard U. S., 767.
United States vs. Warson, 1 Gal. R. 518

Lessee of Sellers vs. Corwin et al. 5 Ohio, 404.
Ross vs. Duval, 13 Peters, 59.
Mayer vs. Foulkrod, 4 Washington C. C., 349.
Campbell vs. Claudius, Pet. C. C., 484.
Lane vs. Townsend, Ware, 288.
Wright vs. Bates, 2 Black, 537.

16. Said 34th section of the judiciary act of Congress relates to framing, not to executing judgments.

Wayman vs. Southard, 10 Wheaton 24, 5 and 6.
Bank of the United States vs. Halstead, ibid, 54.
Parsons vs. Bedford, 3 Peters, 444.
Ross vs. Duval, 13 ibid, 59 and 60.

17. Congress intended the judgments of the Federal Courts to have effect by force of the State laws adopted.

Duncan vs. Darst, 1st Howard, U. S., 306.
Ward et al. vs. Chamberlain et al 2d Black 442.
Corwin vs. Benham, 2d Ohio State R. 39.

18. The lien of judgments and decrees in the Federal Courts *arises* out of the adoption of the State laws upon that subject.

Ward et al. vs. Chamberlain, et al. 2d Black 438.

19. Judgments of the Federal Courts have effect, and are a lien, only because of, and so far as they may have effect, or be a lien by virtue of the State laws adopted.

Massingill vs. Downs, 7 Howard U. S., 760.
Williams vs. Benedict, 8th ibid, 107.
Bayard vs. Lombard, 9th ibid, 551.
McGill vs. Armour, 11th ibid, 142.
The Bank of Tennessee vs. Horn, 17th ibid, 157.
Beauregard vs. the city of New Orleans, 18th ibid, 502 and 3.

The Union Bank of Tennessee vs. Jolly's Admrs., ibid, 507.
Simpson vs. Niles, 1 Carter, (Ind.) 196.
Den ex Dem, Shrew & Winter vs. J. D. Jones, 2d McLean, 78.
Corwin vs. Benham, 2d Ohio State R. 38 and 39.

20. One of the effects of the said process acts of Congress was to render judgments and decrees, for the payment of money, rendered in the Federal Courts, a lien on the land of the debtor in all cases and under like circumstances as when rendered in the State Courts of the States whose process laws were thus adopted.

Ward et al. vs. Chamberlain, et al. 2 Black 442.

21. And when and in those States where the *judgments* of the *Federal Courts* are *liens* on *lands, they become such liens* under and by virtue of the *adoption* of the *process laws* of the *State, one* of the effects of giving power to *sell* lands on execution being to make the *judgment* on which such execution issued a *lien* on such lands.

Ward et al. vs. Chamberlain et al. 2 Black 439 to 444.
Clements vs. Berry, 11 Howard U. S., 411.
United States vs. Morrison, 4 Peters, 124.
Massingill vs. Downs, 7 Howard U. S., 767.

22. The power of a Sheriff or other officer to sell lands on execution, is a naked Statutory power, dependant upon the Statute giving the authoity to sell.

Todd vs. Philhower, 4 Zabr. (N. J.) 796.
Holman vs. Collins, 1 Carter, 28 and 29.
4 Kent's Commentaries, 428.
Gantley's Lessee vs. Ewing, 3d Howard, U. S., 714.
Chapman vs. Harwood, 8 Blackford, 83.
Russell vs. Dyer, 33 N. H., 186.

23. A sale and conveyance of land is void unless authorized by law therefor. Therefore unless said Marshal

had power given him by positive law to levy on and sell lands, that his said sale of said lots is void.

Lane vs. Soulard, et al. 15 Ills. 124.
Green vs. Marks, et al. 25 Ills. 221.
Thatcher vs. Powell, 6 Wheaton, 125.
Johnson's & Graham's Lessee vs. McIntosh, 8 Wheaton, 543
Lessee of Sellers vs. Corwin, 5 Ohio, 398.
Corwin vs. Benham, 2 Ohio St. 36.
The Lessees of Christian Good vs. Elizabeth Zercher, 12 Ohio, 364.

24. I think it clear that the laws and authorities above cited establish the proposition "That the laws of the State of Kansas in relation to judgment liens, and to the sales of land on execution, did not of their own force, or because they were the laws of the State, or under or by virtue of any Act of Congress, extend or apply, either to said judgments so as to make them liens on said lands or any other property, or to said executions or to said Marshal's proceedings thereunder, in the matter of selling the lands in controversy; and therefore, unless such State laws were adopted by the said U. S. District Court, and extended to said executions, the said sale of said land thereunder, was without authority in law and void.

25 Said U. S. District Court of Kansas did not, prior to the first day of November, A. D. 1861, adopt, or attempt to adopt, any State law in relation to proceedings on executions and extend it to proceedings on its executions. Nor has it ever in any manner authorized Marshals to proceed and execute any of its executions issued on its judgments rendered prior to said first day of November, 1861, (and said judgments of said U. S. District Court, under which said sale was had, were rendered before that time.) It has never adopted any law, rule, practice or proceeding in relation to proceedings on, or executing such last mentioned writs of execution. This will be seen by reference to the rules of said Court, (record pages 16 to 19.) Rule No. 12 thereof, (record pages 18 and 19) is the only one which relates to writs of execution or other final process. This Rule 12 was adopted on the first day of November, 1861, (record, page 18,) after said sale of said lots by the Marshal and the execution of his deed, therefor, to Smith, and was by its terms confined to executions and other final process

issued on judgments and decrees thereafter rendered in said Court, which said Rule 12 is as follows:

RULE 12.—That writs of execution and other final process, except their style, issued on judgments and decrees, hereafter rendered in this Court, and the proceedings thereupon, shall be the same as are now used in the Courts of the State of Kansas, unless otherwise expressly directed by the judgment or decree. Provided, that no notice of the time and place of the Appraisement of property levied upon or ordered to be sold shall be required.

All the first ten of said Rules were adopted at the April Term of said Court, that is, at its first Term. And the naming of executions, &c., issued on judgments, &c., of said Court rendered after the adoption of said Rule 12, excluded executions issued on judgments rendered in said Court prior to said first day of November, 1861, from the operation thereof. See the maxim, that the express mention of one thing, implies the exclusion of another. Broom's legal maxims, 505. Also, the fact that said Court on said first day of November, 1861, then adopted said Rule No. 12, shows that it did, itself, consider that such State laws, would not be applicable, or relate to, or govern such Marshal, in his proceedings on executions, issued on judgments rendered after that day, without such adoption, and if not to those thereafter rendered, of course, then such State laws never did extend, or relate to, executions issued on judgments rendered in said Court, *before* that day.

Any adoption of the Kansas process Acts, made by the Court, after such sale of said lots, would not validate the sale.—See the cases above cited, under divisions number 22 and 23, of this argument.

And I submit a ruling that because of any act of said District Court or other authority done after said sale, if held to affect same so as to give validity thereto, would be transferring one man's property to another, which cannot be thus done.

13 Michigan, 330; 15 Ills. 123.

The existence of a rule adopting State process laws is not to be assumed, 6 Peters, 658.

26. The points above made, and objections taken, to the legality of said levy and sale of said lots by said United States Marshal, on said writs of execution, have been made and taken

on what I understand the fact to be, that none of the laws of Kansas regulating the proceedings of the Kansas State Courts on writs of execution, have been, either by Congress or by said U. S. District Court, in pursuance of any power given it by Congress, adopted or extended to the proceedings by said Marshal, had on writs of execution issued on judgments rendered in said U. S. District Court prior to said first day of November, A. D. 1861, and that therefore said sale of said lands was void, because made by said Marshal without authority in law. If I am correct in this, the Court below committed no error in its charge to the jury. Still if I am wrong in this, and if, on the contrary, the Court shall be of the opinion that some portion of the laws of Kansas, and proceedings of the Kansas State Courts has been, by said U. S. District Court adopted, and extended to the proceedings of said Marshal, in his proceedings on his said writs of execution, then it will become important to consider, to what extent an United States Court must adopt the State law in relation to proceedings on writs of execution, &c., if it adopts it at all, or in any part.

27. Sec. 2, p 93, and sec. 2, p. 276, 1st U. S. Statutes at large, limited the power of the Federal Courts over executions and other final process, and the proceedings thereon to their terms and provisions.

Bank of the United States vs. Halstead, 10 Wheaton, 57.

28. And that sec. 3, p. 281, 4th U. S. Statutes at large so limited such powers of the Federal Courts to its provisions and terms. See ibid.

29. And that said sec. 3 repeals said sec. 2, p. 276, 1st U. S. Statutes at large, and is now the controling law in relation to executions and all other final process issued out of Federal Courts, See—

Ross vs. Duval, 13 Peters, 64.

Duncan vs. Darst, 1 Howard U. S., 305.

(See also McCracken vs. Hayward, 2 Howard U. S. 616.)

30. The authority conferred on the Courts of the United States by said sec. 3, over proceedings on writs of execution,

does not empower the courts to adopt a State law in part, or with modifications; but the State law must be adopted as enacted, if at all, or the adoption will be a nullity.

McCracken vs. Hayward, 2 Howard, U. S. 608, 615, 616. (And ses ibid, 616 and 617.)

31. And inasmuch as by said sec. 3, the Courts of the United States were required to adopt the State law as enacted, if at all, it follows that an act of the Court in adopting the State law, in part or with modifications, would be in violation of said sec. 3, and that, therefore, such action of the Court in the matter would be void, because of its violation of an act of Congress, said sec. 3.

Keary vs. the Farmers' and Merchants' Bank of Memphis, 16 Peters, 94.

Amis vs. Smith, ibid, 312 and 314.

as well as for the reason aforesaid.

Therefore, it follows as a consequence that if that part, and only so much of the process laws of the State of Kansas, as the said Marshal in his proceedings on said writs of execution acted in conformity with, was adopted by said Court and extended to his proceedings thereon, that such partial adoption and extension, and in consequence thereof his, said Marshal's acts and proceedings thereunder were void, because a material part of the process laws of Kansas, that is so much thereof, as requires an appraisement of the land levied on, and prohibits a sale thereof, for less than two-thirds of its appraised value, and also so much thereof as requires notice of appraisement, was not regarded by said Marshal, but his said proceedings on said executions were in violation thereof, as was shown on the trial of this case in the court below, as can be seen by an examination of the record of exceptions, (record page 22.) And that the provisions of the Statutes of Kansas, in relation to appraisement of land to be sold on execution, and the giving of notice of the time, &c., of such appraisement to the owners thereof, is such a material part of the law of Kansas governing sales of land on execution, that only on compliance therewith could a sale be made under the same, will be seen by reference to the laws and authorities hereinafter cited for that purpose.

32. The only law or rule of any kind in force in the State

of Kansas, when said sale was made, which authorized the levying on and sale of lands, on any writs of execution, was the Statutes of Kansas, and by those laws of Kansas it was, and is provided, and required, that if execution be levied upon lands, the officer levying shall call an inquest of three disinterested householders, and administer to them an oath, impartially to appraise the property so levied upon, upon actual view, and such householders shall forthwith return to said officer, under their hands, an estimate of the real value of said property

Sec. 444, p. 198, Compiled laws of Kansas.

33. The officer receiving such return shall forthwith deposit a copy thereof with the Clerk of the Court from which the writ issued.

Ibid, p. 198, sec. 445.

34. But no such property shall be sold for less than two-thirds of the value returned in the inquest.

Ibid, p. 198–9, sec. 446.

35. If lands levied on as aforesaid are not sold upon one execution, other executions may be issued to sell the property so levied upon.

Ibid, p. 200, sec. 454.

36. In all cases where *real estate* has been, or may hereafter be, taken on execution and appraised, and twice advertised and offered for sale, and shall remain unsold for want of bidders, it shall be the duty of the Court from which such execution issued, on motion of the plaintiff, to set aside such appraisement, and order a new one to be made, or to set aside such levy and appraisement and award a new execution to issue, as the case may require.

Ibid, p. 202, sec. 459.

37. If the Court, upon the return of any writ of execution, for the satisfaction of which any lands have been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has in all respects been made in conformity to the provisions of title 14 of the Statutes of Kansas,

entitled " An Act to establish a code of civil procedure," approved February 11th, 1859; (and the sections 444, 445, 446, 454, 459, 449 and 450, herein cited, are all included in said title 14,) the Court shall direct the Clerk to make an entry on the Journal, that the Court is satisfied of the legality of such sale, and order that the officer make to the purchaser a deed for such lands and tenements.

Ibid, p. 199, sec. 449.

38. The Sheriff or other officer who, upon such writ or writs of execution shall sell the said lands, shall make to the purchaser thereof, as good and sufficient deed of conveyance of the lands sold, as the person or persons against whom such writ or writs, of execution were issued, could have made of the same, at any time after they became liable to judgment. The deed shall be *sufficient* evidence of the legality of such sale, and the proceedings therein, until the contrary be proved.

Ibid, pages 199 and 200, sec. 450.

39. An officer, selling lands on execution under said laws of Kansas, (either because, if a Sheriff, they empower him to make such sale of their own force, or if an United States Marshal, because they have been adopted either by Act of Congress, or rule of U. S Court, and extended to the execution under which he sells,) depends, if he be a Sheriff, upon said laws of Kansas, for his power to sell, and if he be an United States Marshal, upon such laws, and also upon such adoption and extension thereof, for his power and authority to sell—and is thereby *prohibited*, by positive law, from selling the same without appraisement, or for less than two-thirds of the appraised value thereof, and has not the power to make such sale for less than such two-thirds of such appraised value thereof.

Hefferlin vs. Sinsinderfer, et al. 2 Kansas, 401.
Gantley's Lessee vs. Ewing, 3 Howard, U. S., 707.
Collier vs. Stanbrough, 6 ibid, 14.
Curtis vs. Doe ex dem. Breese, (1 Illinois,) 139–142.
Evans vs. Landon, 1 Gilman, 309.
Harrison vs. Rapp, 2 Blackford, 1.
Holman vs. Collins, 1 Carter, (Ind.) 24.

Morse vs. O'Neal, 2 ibid, 65.
Vail vs. Craft, ibid, 359.
Spratt vs. Reid, 8 Iowa, 489.
Babcock vs. Doe, 8 Indiana, 110.
Lessee of Patrick vs. Oosterout, 1 Ohio, 27.
Daniels vs. McBain, 2 Ohio State, 408.
Baird vs. Lent, 8 Watts, 422.
~~Pepper vs. Copeland, 2 Miles, 410—4 U. S. D., 771, § 846.~~
Succession of Hiligsberg, 1 La. Ann. R., 340—9 U. S. D., 219, § 58 and 59.
~~Wray vs. Miller, 20 Penn. (8 Harris,) 111.~~
Bannister vs. Higginson, 3 Shep., 73.
Russ vs. Gilman, 4 Shep., 209.
~~Munroe vs. Reding, 3 Shep., 153.~~
Bradley vs. Bassett, 2 Cush., 417.
Coggswell vs. Mason, 9 N. H., 48.
Whittier vs. Varney, 10 N. H., 291.
Chamberlain vs. Doty, 18 Pick., 495.
~~Darling vs. Robbins, 6 Shep., 405.~~
Sleeper vs. Newberry Seminary, 19 Vt., 451.
Pierce vs. Strickland, 26 Maine, (13 Shep.) 277-9.
Harriman vs. Cummings, 45 Maine, 351.
Avery vs. Bowman, 39 N. H., 393.

40. And purchasers must take notice of this prohibition, and want of power in the officers to sell for less than a sum certain, that is, such two-thirds of the appraised value of the land to be sold, and must make inquiry and bid accordingly, if they desire to obtain title to the property sold.

Gantley's Lessee vs. Ewing, 3 Howard, U. S., 715.
Collier vs. Stanbrough, 6 ibid, 22.
Curtis vs. Doe, ex dem., Breese (1 Illinois) 141.
Holman vs. Collins, 1 Smith, 58 and 1 Carter (Ind.) 24.

41. That all persons have notice of and are conclusively presumed to know the public law of the land, and its requirements, and cannot be heard to aver or prove the contrary,

See the maxim that ignorance of the law does not excuse, Broom's legal maxims, 190.

42. By an act of the Legislature of Kansas entitled "An act relating to sales of real property," approved Feb. 27, 1860, Laws '60, page 175, which was in force when said Marshal made said sales, the officer making sale of lands under the Statutes of Kansas, was required to give five days notice of the appraisement to the owner of the land, if he was a resident of the County where the property was situated, and twenty days notice by publication, if such owner was a non-resident of such County, and such owner was also thereby entitled and allowed to designate what lands should be sold. The want of such notice, which was not given by said Marshal, would of itself vitiate said sale and render it null and void.

Goodright vs. Gilbert, 1 Yeates 300, 3 U. S. D., 376 § 427
Howe vs Starkweather, 17 Mass., 240.
Davis vs. Maynard, 9 ibid, 242.
Hammott vs. Wyman, ibid, 138.
Williams vs. Armory, 14 ibid, 20.
Wellington vs. Gale, 13 ibid, 483.
Curtis vs. Norton, 1 Hammond, 278.
Borden vs. Smith, 3 Dev. and Batt., 34–4 U. S. D., 756 § 460.
Mitchel vs. Like, 8 Yerger, 179–4 U. S. D., 758 § 506.
Den vs. Dawman, 1 Green, 135–4 U. S. D., 761 § 592.
Helm vs. Alexander, 10 Humphreys, 44.
Richards vs. Meeks, 11 ibid, 455.
Shultz vs. Elliott, ibid, 183–12 U. S. D., 291 § 102, and ibid, 289 § 66, and ibid, 292 § 121.
Hinson vs. Hinson, 5 Sneed, 322–19 U. S. D., 301 § 142.
Breese vs. Bange, 2, E. D. Smith, 474–493–18 U. S. D., 321 § 83.

43. The description of the causes of action, (See record pages 19 to 22) on which the suits were founded, in which the said judgments were rendered in said U. S. District Court, shows them to have been promissory notes made in Kansas, by residents thereof after the passage of the present law regulating sales of land, including the appraisement law above set forth. Such law entered into, and formed a part of the contracts between the parties to said notes the same as though that portion of said law which relates to appraisement, had been embodied in, and made a part of said notes and it

makes no difference whether the right to have property appraised, and not sold for less than two-thirds of the appraised value thereof, is conferred by the terms or the law of the contract.

McCracken vs. Hayward, 2 Howard, U. S, 613.
Bronson vs. Kinzie, 1 ibid, 319 and 320.
Gantley's Lessee vs. Ewing, 3 ibid, 716 and 717.
Howard vs. Bugbee, 24 ibid, 461.
Holman vs. Collins, 1 Smith, 58, and 1 Carter, (Ind.) 24.
Stewart vs. Vermilyear, 8 Blackford, 56 and 57.
Lane vs. Fox, ibid, 58.
Hunt vs Gregg, ibid, 108
Harrison vs. Stipp, ibid, 455.
Willard vs. Longstreet, 2 Douglass, 174.
Rosier vs. Hale et al, 10 Iowa, 470.
Landis vs. Abrahams, 11 ibid, 284.
Moore vs. Fowler, 1 Hemp. 536, referred to in 17 U. S. D. 126 § 53.
Bailey vs. Gentry and wife, 1 Missouri, 165.
Brown vs. Ward, ibid, 209.
Bumgardner vs. Clerk Howard County, 4 ibid, 50.
Stevens vs. Andrews, 31 ibid, 205.
Rue vs. Decker, 3 McLean, 575.

44. And as such part of the contract, the State appraisement law would be obligatory upon parties in the United States Courts, suing on contracts made after its passage, [in addition to the general principle of law, that the law and meaning of a contract is to be construed, and the same effect as a contract given to it in every court]

Bronson vs. Kinzie, 1 Howard, U. S., 321 and 322.
Rue vs. Decker, 3 McLean, 575.

45. And even if said appraisement law was not a part of the contract, when made, that it became a part thereof when the judgment was rendered in Kansas, where an appraisement law was then in force, as well as at the time of the sale, (if the

process laws of Kansas were applicable to said judgments and executions.)

Holman vs. Collins, 1 Carter (Ind.) 27.

46. And in the absence of evidence as to when and where the contract was made, the law in force at time of rendition of judgment must control and govern the sale and powers &c. of the officer selling.

Morss vs. O'Neal, 2 Carter, (Ind.) 66.
Hunt vs. Gregg, 8 Blackford, 108.
2 Kansas, 404.

47. And the adoption of a rule or mode of proceeding by said U. S. District Court, which would have authorized said U. S. Marshal to sell the lands of the makers of said note, without appraisement, or for less than two-thirds of the appraised value thereof, would impair the obligation of the contract, the appraisement law aforesaid being a part thereof, as above shown, and would therefore be void, because conflicting with the Constitution of the United States, [as well as because, as above shown, it would only be adopting a part of the State law, leaving a material part thereof, that is so much thereof as relates to appraisement and the price at which the land should be sold, inoperative, as to such Marshal, when if a State law in relation to proceedings on execution, is adopted at all by a Federal Court, it must all be adopted, without change or modification.]

Keary vs. The Farmer's and Merchant's Bank of Memphis, 16 Peters, 94–95 and 96.
Amis vs. Smith, ibid, 313 and 314.
Bronson vs. Kinzie, 1 Howard, U. S., 315.
McCracken vs. Hayward, 2 ibid 615 and 616.

48. As the Marshals and Courts of the United States are necessarily governed by the same rules that the Sheriffs and Courts of the respective States are, in respect, to the execution &c., of adopted laws, they must proceed in the same manner.

Duncan vs. Darst, 1 Howard, U. S., 309—310.
Amis vs Smith, 16 Peters, 312—313.
Collier vs Stanbrough, 6 Howard, U. S, 14.

49. The power of a Sheriff or other officer to sell lands on execution, is a naked statutory power, not coupled with an interest, and if the performance of all the pre-requisites and requirements of the law be not complied with, the sale will be void.

Todd vs Philhower, 4 Zabr. N. J. 796.
Holman vs. Collins, 1 Carter, 25—6 and 28.
4 Kent's Com., 431.
Gantley's Lessee vs. Ewing, 3 Howard, U. S. 714.
Chapman vs. Harwood, 8 Blackford, 83
Russell vs. Dyer, 33, N. H. 186.

50. Even if the Marshal was authorized to levy and sell, still, as his sales have not been confirmed, his deed does not make out a *prima facie* title without showing that the requisitions of the law he sold under, if he sold under any at all, had been complied with by the Marshal, including the appraisement and previous notice thereof.

Curtis vs. Norton, 1 Ham., 278—3 U. S. D., 378, sec. 489.
Den vs. Dowman, 1 Green, 135—4 U. S. D., 761, sec. 592.
Curtis vs. Doe ex. dem., Swearingen, Breese (1 Ill.) 139.

The Statutes of Kansas only make the Sheriff's deed *prima facie* evidence of title, when made after confirmation, in pursuance of an order of Court.

Compiled laws of Kansas, 199 and 200, sec. 450.
3 Kansas, 397.

51. It has been and may in this Case be claimed that "as a rule of property," said judgment of said U S. District Court became a lien on the lands of the judgment debtors, and that, therefore, to carry out and make effectual such "rule of property," said Marshal might proceed and levy on, and sell said lots.

It is certainly not improper here to inquire, what is a rule of property? Is it anything but the law of the land applied to the facts of the case, as it may relate to property?

And as there is no law of Congress making judgments of the Federal Courts liens on land,

And as the law making power of the State of Kansas, did not intend, that the laws of the State, in relation to judgments and executions, should, of their own force, extend or relate to judgments in the Federal Courts, or to executions issued thereon, or to proceedings under the same,

And as a State law cannot of its own force, affect judgments in the Federal Courts, or executions issued thereon, or proceedings under the same,

And as the judgments of such of the Federal Courts as are liens on land, become such liens under, by virtue, and as one of the effects of the adoption of the State process laws, of the State where such Court is held, by Congress, or by the Courts of the United States under the authority of Congress, as provided by the process Acts of Congress,

And as such liens arise out of such adoption of State process laws; such adoption being necessary before the State process laws, under said 34th section of the Judiciary Act, become a rule of decision or of property as to matters in the Federal Courts.

2 Black 438.

And as none of the process laws of Kansas were in force when said process laws of Congress were enacted, they were not thereby adopted,

And as such laws of Kansas have not been adopted by said U. S. District Court of Kansas as to said judgments rendered therein, or extended to the same, or to any executions issued thereon, or to any proceedings thereunder,

And as judgment liens are the creations of positive law, without which they cannot exist, and must be created by the government under whose authority the judgment was rendered, which proposition is shown as distinctly as can be stated by the following extract from the opinion of the Supreme Court of Ohio, in the case of

Corwin vs. Benham, 2 Ohio State R., 38 and 39,

wherein Ranney, Judge, in delivering the opinion of the Court, said:

"That judgment liens are the creations of positive law, without which they cannot exist, and that they cannot survive

the law which gives them being, are principles too well settled to be drawn in question. I suppose it equally clear, that they must be created by the government under whose authority the judgment is rendered. The State may determine the effect of its own judgments, but cannot affect those rendered by the Courts of the United States; while the same limitation is equally true of the legislation of the General Government. Each has an equal right to provide for the security and satisfaction of judgments rendered in its Courts; but neither has any power whatever to limit this sovereign right in the other. In a system as complex as ours, with two governments extending over the same people, it is easy to imagine conflicts of authority. They can only be avoided by confining each strictly to its own appropriate sphere of action, and by the exercise of that usual forbearance which arises from regarding each as equally entitled to our affection, confidence and respect."

It follows that the rules or laws of Kansas, in relation to the judgments of its Courts, their liens, executions and proceedings thereon, never applied to said judgments so rendered in said U. S. District Court, or to said executions so issued thereon, or to any of the proceedings thereunder, and that no rule or law making judgments, liens, was ever adopted as to said judgments or any process or proceedings thereunder, or in any manner extended or made applicable, or to relate, or have reference to the same.

And that therefore, if said judgments were liens on said lots, that they became such liens without any law applicable thereto, giving them such effect, either directly or indirectly. How then could said judgments, they being without any law applicable thereto, making judgments, liens, properly be said to be liens on said lots, "as a rule of property," or in other words, "as a law of property." It appears to me, that "as a rule or law of property," said lots were still held by the judgment debtors without any lien thereon, and that they might sell or otherwise dispose of the same, and convey the same by a free, clear, and unincumbered title, notwithstanding said judgments, the same as they might have done, notwithstanding judgments against them in the State Courts, if the State laws did not make the judgments of its Courts liens on lands. I submit that the "rule of property" question, as to any lien of said judgments in said U. S. District Court, will not arise until by some Act of Congress or rule of the Federal Court, the State process law is adopted and extended to said judgments and process issued thereon.

As there is no law but the laws of the State of Kansas in force within the jurisdictional limits of said U. S. District Court,

which makes any judgments, liens, on lands, or give authority to any officer whatever to levy on, or to sell lands on execution, and as such Kansas State laws have not been adopted, either by act of Congress, or by said U. S. District Court, as to said judgment, or the process, or proceedings thereon, it follows, that if said judgment was a lien on said lots, and if said Marshal had authority to make such sale, that such lien arose, and such Marshal obtained his authority to sell from the State laws, *unadopted.*

If "as a rule of property," or otherwise at all, said State laws of their own force, without *adoption*, relate to said judgments, or proceedings thereunder, then not only is the Supreme Court of the United States, wrong, in all those cases above cited wherein they have decided that only such State laws, as were in force at the time when said process Acts of Congress were enacted, and such as have been since adopted by the Federal Courts, under the power given them by Acts of Congress, govern or control United States Marshals in their proceedings on executions issued out of the Federal Courts, but if the State of Kansas can pass laws, which will, without adoption, affect the judgments of the Federal Courts, or the process thereof, or proceedings under the same, either by establishing "rules of property," or otherwise at all, it would follow as a necessary consequence, that the force and effect of the judgments of the Federal Courts, and of executions issued thereon, would at all times, be at the mercy and subject to the control of the State legislatures, they using such power under the pretext of establishing "rules of property," and under such pretext could indirectly do that which they could not do directly, that is by their own power, control the United States Marshal in his proceedings on executions. It is easy to imagine how, by such "rules of property," the judgments of any Court could be made worthless, and the supremacy of the State, over the National Government, in the matter of giving effect to, and enforcing and controling the judgments of the Federal Courts, made effectual.

That the legislature of a State cannot control the modes of proceeding in suits depending in the Courts of the United States, or regulate the conduct, or prescribe the powers of their officers, in the service of executions issuing out of those Courts, or do indirectly, that which, they cannot do directly, in relation to process of the Federal Courts, cannot well be stated more distinctly, than by making an extract from a decision of the Supreme Court of the United States in relation to

that point, as the same may be found on pages 49 and 50 of 10 Wheaton, in the above cited case of Wayman vs. Southard, wherein Chief Justice Marshall, in delivering the opinion of the Court, said:

"The question really adjourned is, whether the laws of Kentucky respecting executions, passed subsequent to the process Act, are applicable to executions which issue on judgments rendered by the Federal Courts? If they be, their applicability must be maintained, either in virtue of the 34th section of the Judiciary Act, or in virtue of an original inherent power in the State legislatures, independent of any Act of Congress, to control the modes of proceeding in suits depending in the Courts of the United States, and to regulate the conduct of their officers in the service of executions issuing out of those Courts. That the power claimed for the State is not given by the 34th section of the Judiciary Act, has been fully stated in the preceding part of this opinion. That it has not an independent existence in the State legislatures, is, we think, one of those political axioms, an attempt to demonstrate which, would be a waste of argument not to be excused. The proposition has not been advanced by counsel in this case, and will probably never be advanced. Its utter inadmissibility will at once present itself to the mind, if we imagine an Act of a State legislature for the direct and sole purpose of regulating proceedings in the Courts of the Union, or of their officers in executing their judgments. No gentleman, we beleive, will be so extravagant as to maintain the efficacy of such an Act. It seems not much less extravagant, to maintain that the practice of the Federal Courts, and the conduct of their officers, can be indirectly regulated by the State legislatures, by an Act professing to regulate the proceedings of the State Courts, and the conduct of the officers who execute the process of those Courts. It is a general rule, that what cannot be done directly from defect of power, cannot be done indirectly."

The same principle of law is recognized in several other cases. In the case of

Ward et al. vs. Chamberlain, et al., 2 Black, 440.

Mr. Justice Clifford, in delivering the opinion of the Court, said:

"Those cases (referring to Wayman vs Southard, and Bank of the United States vs. Halstead,) among other things, affirm: 1. That the States have no authority to control or regulate the proceedings in the Courts of the United States, except so far as the State process Acts are adopted by Congress, or by the Courts of the United Sates under the authority of Congress."

And again, on page 442, ibid, in the same opinion, it is said:

"Undoubtedly Congress intended by that provision (referring to sec. 3 of the process Acts of 1828,) to adopt the State laws in respect to the proceedings on final process as they existed at the *date* of the *Act*, and the effect of the enactment, or one of its effects, was to render judgments and decrees for the payment of money rendered in the Federal Courts a lien on the land of the debtor, in all cases and under like circumstances as when rendered in the State Courts."

And again, ibid, 438, in the same opinion, it is said:

"Repeated decisions of this Court also have established the doctrine, that the lien of judgments and decrees in the Federal Courts arises out of the *adoption* of the State laws upon that subject."

And in Beers vs. Haughton, 9 Peters, 359, Story, Judge, in delivering the opinion of the Court, said:

"State laws cannot control the exercise of the powers of the National Government, or in any manner limit or affect the operation of the process or proceedings in the National Courts. The whole efficacy of such laws in the Courts of the United States, depends upon the enactments of Congress. So far as they are adopted by Congress they are obligatory. Beyond this they have no controling influence."

If "as a rule of property," arising from the laws of Kansas, said Marshal had authority to make said sale of said lots, why, "as a rule of property," were not the United States Marshals required to proceed on the executions of the Federal Courts, in conformity with the *unadopted* State laws of the different States, passed subsequently to the enactment of the process Acts of Congress, and referred to in the above cited cases of

Wayman vs Southard.
Bank of the United States vs. Halstead.
Beers vs. Haughton, and Ross vs. Duval?

If "as a rule of property," the State laws of Kansas already passed, gave power to the said Marshal to make said sale, then, of course, such State laws impose duties, and, "as a rule of property," required him to sell in conformity with the same, that is, to give the notice of appraisement above mentioned, and to appraise the property to be sold, and not to sell the same for less than two-thirds of such appraised value. And also, any State law hereafter passed, in relation to judgments, their liens, and proceedings under the judgments, will, "as a rule of property," require the Marshal of the United States, to

execute the process of the Federal Courts, in conformity with such subsequently enacted law.

I submit that the rule or law of property question is not applicable to this case, as contended for, by plaintiff in error, but only, for the purpose of showing that, as said judgment, was not a lien on said lots, that the same might well be conveyed free of incumbrance by Jeremiah Clark, to defendant in error.

52. And when a party seeks to enforce a contract by judgment and execution, in cases where the Court and laws giving the remedy, are not within the same jurisdiction, or controlled by the same remedial laws, as that wherein the contract was made, such party must take the remedy as he finds it given him by the Court, under the laws which govern the Court and its officers, in which he seeks his remedy.

Holman vs. Collins, 1 Carter, (Ind.) 24.
2 Kansas, 404 and 405.

53. The law of the *forum*, is to govern in the enforcement of causes of action, and administration of justice, &c., including executions, &c.

Bank of the State of Alabama vs. Dalton, 9 Howard, U. S., 528.
Story, on Conflict of laws, secs. 556, 557, 558, 570, 571 and 572.

54. And even if said sale of said lots, on said execution, by said United States Marshal, is in all respects valid, still it is claimed, that the title does not vest on sale of lands in Kansas until confirmation is had by the Court, and the officer is ordered by the Court to make a deed to the purchaser, as provided for in said section 449, p. 199, of said compiled laws of Kansas, and that the officer selling under said laws, or because they have been adopted as to his proceedings on execution, cannot make the deed of conveyance to the purchaser until such confirmation, and order to make a deed.

Lessee of Curtis vs. Norton, 1 Ohio, 278.

wherefore for want of any confirmation by the District Court of said sales of said lots, and also for want of such order, the

Marshal's deed is void, such order to make a deed being a condition precedent to the power in the officer to make the deed, or rather his power to make a deed does not arise until after he is by the Court ordered so to do, and his deed after being so ordered to make it, is only *prima facie* evidence of legality of sale &c. The confirmation order of Court not being conclusive on the parties.

Benz vs. Hines & Tarr, 3 Kansas, 390—397.

and the rule of evidence established by this case is conclusive on this Court.

Wright vs. Bates, 2 Black, 537.

55. That as this Court does not hesitate to hold *rules* adopted improperly, or without proper authority, (as in case of a District Judge, in the Circuit Court, by rule adopting a State law, without the concurrence of the Circuit Judge,) null and void.

Amis vs. Smith, 16 Peters, 314.

Therefore I suppose the Court will not hesitate to hold that the Clerk of said U. S. District Court for Kansas, *had not authority,* in the vacation of said Court, (without any law or rule of Court authorizing him so to do,) to include in his said writ of executions so by him issued on the said judgments so rendered in said U. S. District Court, the commands therein contained, so far as they relate to *lands* and *tenements.*

In conclusion, I submit that the authorities above cited show that the Circuit Court did not err in instructing the Jury, that the Marshal's deed to plaintiff in error was void, because :

1st. Said judgments against Clark et al. were not liens on his lots.

2d. The commands about lands and tenements in said executions were unauthorized and void.

3d. The State process laws not having been adopted (either in practice or by express rule) by said District Court, the Marshal had no power to levy on or sell said lots, for want of any law authorizing him so to do.

4th. Now and only in case I am wrong in the three preceeding propositions, then the sale and of course deed was

void. 1st, because no notice of appraisement appears to have been given as required, and 2d, because the property was sold without appraisement.

5th. And even if I am wrong in all of the above propositions, still the said Marshal's deed was void, because the sale was not confirmed, nor, was he ordered to make a deed, the officer not being empowered to make a deed until after confirmation of the sale, nor until so ordered so to do.

I submit, however, that the Marshal made his said sale without any law or pretence of right so to do—it cannot even be claimed that the process laws of Kansas were adopted orally or by practice or implication, because one of the main and most important parts thereof, that is the provisions about appraisement of the property to be sold were not complied with, and any claim that so much of the Kansas process laws were adopted as said Marshal complied with brings the case of such claimant within the case of

McCracken vs. Hayward, 2 Howard, 613 et seq.

and leaves such partial adoption a mere nullity.

A decision of the first three points is respectfully solicited even if the Court should be of the opinion that the deed was void for other reasons, because unless those points are now decided there is not any reasonable prospect that this case will determine this controversy, as there is enough in the Record to inform the Court that this has become a contest between different creditors of Clark, as to which will make something on their debts against him, and if the *levy* of said Marshal on the lots is not void, then the parties lost nothing by their attempt to get the property, *cheap*, when I submit the cause of justice is not subserved by permitting those who proceed in disregard of law, to mend their hold.

Whittelsey vs. Brohammer, 31 Missouri, 109—110.

L B Wheat
Atty for Deft in Error